

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 22, 2009

STATE OF TENNESSEE v. MARILYN MAXINE BAKER

**Direct Appeal from the Circuit Court for Bedford County
Nos. 16418 & 16430 Lee Russell, Judge**

No. M2008-01188-CCA-R3-CD - Filed August 13, 2009

The Defendant, Marliyn Maxine Baker, pled guilty to two counts of driving under the influence (“DUI”), seventh offense, a Class E felony, two counts of driving on a revoked license, a Class B misdemeanor, and violating the implied consent law. The trial court sentenced the Defendant to an effective sentence of four years in the Tennessee Department of Correction (“TDOC”). The Defendant appeals, contending the trial court erred in setting the length of her sentences. After a thorough review of the record and relevant authorities, we conclude the trial court properly sentenced the Defendant. As such, we affirm the sentences imposed by the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined. DAVID H. WELLES, J., concurred in results only.

Michael J. Collins, Shelbyville, Tennessee, for the Appellant, Marilyn Maxine Baker.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; Charles Crawford, District Attorney General; Michael D. Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from two incidents, two weeks apart, where the Defendant drove under the influence while her driver’s license was revoked. During the Defendant’s plea submission hearing, the State gave the following account of the first of these incidents:

[On September 14, 2007,] an officer came upon a vehicle, basically, I believe in the middle of Cannon Boulevard that was blocking both lanes of Cannon Boulevard. And the officer made contact with the driver, who was the [D]efendant. And she indicated that she was having some trouble with the car [because] it wouldn't go in gear. [The officer] actually was trying to help her get out of the roadway. In the process, she apparently backed up and hit a curb, and pulled forward, and he actually became concerned that it was more than just a mechanical problem there. I think ultimately he got her out of the roadway, and began interacting with her. And in his mind, she appeared to be confused and disoriented. He ran a check on her driver's license, of course, [and] it was suspended for the failure to have proof of insurance.

There were some empty bottles of Alprazolam and Hydrocodone in the vehicle. And he asked if she had been taking her medication. And she said he had taken it earlier because she had back trouble and it was for back pain. He asked if she would be willing to give a blood sample to determine what was in her system. And she was willing to do that. . . . [T]he only field sobriety test he administered was the finger dexterity test. And, again, in his mind, he felt that she did not perform that satisfactorily. He noticed that she appeared to be very unstable on her feet when walking to the back of the patrol car, and . . . she had to lean on the vehicle to steady herself.

A blood sample was taken. [The Tennessee Bureau of Investigation ("TBI")] analyzed it. And it came back positive for four substances [Carisoprodol, Meprobamate, Diazepam, and Nordiazepam.]

The TBI analysis revealed that the Defendant did not have alcohol in her system at the time of the stop.

The State also described the second incident at issue, which occurred on September 27, 2007, while the Defendant was released on bond after her arrest stemming from the September 14 incident:

[Around noon,] the police department responded to a motor vehicle accident in the area of Elm Street and Madison Street. And that possibly one of the drivers involved was intoxicated. . . .

When [the officers] got there, the [D]efendant was the driver of one of the vehicles, she was still behind the wheel. The officers that responded all agreed that she appeared to be disoriented, her speech appeared to be slurred. They felt she was

too unstable to perform field sobriety tasks. Her license was suspended. . . .

She was asked if she would give a blood sample and she refused. But in all the officers' minds, the [D]efendant appeared to be under the influence of an intoxicant of some sort, either drug or alcohol, to the extent that her ability to operate a motor vehicle would have been impaired.

. . . [The Defendant] does have prior DUI convictions that make this [her seventh DUI offense.]

The Defendant pled guilty to two counts of DUI, seventh offense, two counts of driving on a revoked license, and to one count of violating the implied consent law. In order to determine the length of her sentence, the trial court held a sentencing hearing. At this hearing, the trial court admitted a letter from the Defendant and a presentence report as exhibits, and the Defendant's mother testified.

According to the presentence report, the Defendant graduated from Central High School in Shelbyville, Tennessee, in 1971. In 1983, at age thirty, the Defendant received her first DUI conviction. Between 1983 and 2005, the Defendant received a total of seven DUI convictions. During this time, the Defendant also was convicted of grand larceny, disorderly conduct, public intoxication, misdemeanor stalking, and violating the implied consent law. The Defendant committed the public intoxication offense in 2000 while she was on probation for one of her seven DUIs.

The Defendant has married and divorced four times. She has two adult children. The Defendant worked intermittently at Hardee's in Bedford County for fifteen years until 2004, when she began to receive Social Security Income Disability based on a back condition.

The investigation report included an "official version" of the Defendant's conduct at issue. According to the report, the officer who arrested the Defendant on September 14, 2007, noticed the Defendant's car while he was on patrol. On South Cannon Street, he observed the Defendant's car stopped in oncoming lanes: "The vehicle was blocking both outbound lanes of traffic." When the officer instructed the Defendant to back her vehicle out of the roadway, she backed her vehicle onto a sidewalk. She then put the vehicle in drive and attempted to pull out into the oncoming traffic. According to the report, the officer had to stop the Defendant from pulling out into the traffic.

The report also included an account from the officer who arrested the Defendant two weeks later upon receiving reports of a vehicle accident. The officer said that, when he arrived, he could

tell that the Defendant's vehicle had been involved in an accident. The report included the Defendant's account of her September 2007 conduct. In this account, she said that on September 27 she struck another vehicle: "[I] was smoking a cigarette, accidentally dropped it and when I reached down to pick it up, I veered in the other lane and hit a truck."

The Defendant's eighty-six year old mother, Mary Cunningham, testified at the sentencing hearing. She said she had never known her daughter to have a drinking problem. Although Cunningham acknowledged her daughter took prescription painkillers, she "did not know" whether her daughter abused the painkillers. Explaining that she depends on the Defendant because the Defendant cares for her, Cunningham asked the trial court to have mercy on her daughter.

At the conclusion of the sentencing hearing, the trial court found that three enhancement factors, which we will discuss in detail in our analysis, applied to the Defendant's convictions, and it found that no mitigating factors applied. The trial court sentenced the Defendant to two years for each of her DUI, seventh offense, convictions, to six months for each of her driving on a revoked license convictions, and the court suspended the Defendant's driver's license for one year for her violation of the implied consent law. The trial court concluded that, because the September 27 DUI was committed while the Defendant was on bond for the September 14 DUI, consecutive sentencing for the DUI convictions was mandatory. *See* Tenn. R. Crim. P. 32(c)(3)(C) (2006). Accordingly, the trial court imposed a total effective sentence of four years in the TDOC. It is from these judgments that the Defendant now appeals.

II. Analysis

The Defendant contends the trial court improperly applied enhancement factors (1) and (10) to her two DUI, seventh offense, convictions. *See* T.C.A. § 40-35-114 (2006). As such, the Defendant continues, the trial court failed to follow appropriate sentencing procedures, and this Court cannot presume her sentences are correct. She argues this Court should reduce her sentences to the statutory minimum after a de novo review. The State concedes that the trial court improperly applied enhancement factor (10) to the Defendant's convictions and that, therefore, de novo review is appropriate. The State contends, however, that the trial court appropriately applied enhancement factors (1) and (8), which, upon de novo review, justify the Defendant's sentence. As we discuss in detail below, however, this Court does not agree with the parties that the trial court erred when it applied enhancement factor (10) to the Defendant's sentence.

When a defendant challenges the length, range, or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court properly sentenced the defendant. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show

that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts. If the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

The Criminal Sentencing Act of 1989 and its amendments describe the process for determining the appropriate length of a defendant’s sentence. Under the Act, a trial court may impose a sentence within the applicable range as long as the imposed sentence is consistent with the Act’s purposes and principles. T.C.A. § 40-35-210(c)(2) and (d) (2006); *see State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). The Tennessee Code allows a sentencing court to consider the following enhancement factors, among others, when determining whether to enhance a defendant’s sentence:

(1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;

...

(8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;

...

(10) The defendant had no hesitation about committing a crime when the risk to human life was high

T.C.A. § 40-35-114(1), (8), and (10). If an enhancement factor is not already an essential element of the offense and is appropriate for the offense, then a court may consider the enhancement factor in its length of sentence determination. T.C.A. § 40-35-114 (2006). In order to ensure “fair and consistent sentencing,” the trial court must “place on the record” what, if any, enhancement and mitigating factors it considered as well as its “reasons for the sentence.” T.C.A. § 40-35-210(e). Before the 2005 amendments to the Sentencing Act, both the State and a defendant could appeal the manner in which a trial court weighed enhancement and mitigating factors it found to apply to the defendant. T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendments deleted as grounds for appeal, however, a claim that the trial court did not properly weigh the enhancement and mitigating factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 8, 9. Therefore, although this Court cannot review a trial

court's weighing of enhancement factors, we can review the trial court's application of those enhancement factors. T.C.A. § 40-35-401(d)(2) (2006).

The Defendant is a Range I offender, and DUI, seventh offense, is a Class E felony. T.C.A. § 55-10-403(a)(1)(A)(vi) (2006). Therefore, the appropriate range for each of the Defendant's DUI, seventh offense, convictions is one to two years. *See* T.C.A. § 40-35-112(a)(5) (2006). At the conclusion of the Defendant's sentencing hearing, the trial court applied three enhancement factors to each of the Defendant's DUI, seventh offense, convictions. *See* T.C.A. § 40-35-114(1), (8), and (10). The trial court imposed enhanced sentences of two years for each of her DUI, seventh offense, convictions.

The Defendant does not object to the trial court's application of enhancement factor (8), which applied because the Defendant committed the offense of public intoxication while on probation from one of her DUI convictions. *See* T.C.A. § 40-35-114(8). Similarly, the Defendant objects to neither the sentences she received for her driving on a revoked license convictions nor the alignment of her sentences. The Defendant disputes, however, the trial court's application of enhancement factors (1) and (10) to her DUI, seventh offense, convictions, so we address each factor's applicability below.

A. Enhancement Factor (1): the Defendant's Criminal History

The Defendant first challenges the trial court's application to each of her convictions of enhancement factor (1), that the Defendant had a history of criminal conduct, to each of her convictions. *See* T.C.A. 40-35-114(1). She concedes that she has a history of criminal conduct but contends her criminal record does not justify the trial court's enhancement of her sentences. As we have discussed, however, this Court may not properly consider an objection to the weight given any enhancement factor; rather, we may only address whether the enhancement factor was properly applied. *See* T.C.A. § 40-35-401(d)(2). The record shows that the State adequately established the Defendant had previously been convicted of grand larceny, disorderly conduct, public intoxication, and stalking. Therefore, the trial court properly applied this enhancement factor and we refrain from addressing the weight the trial court afforded this factor. *See Carter*, 254 S.W.3d at 343. The Defendant is not entitled to relief on this issue.

B. Enhancement Factor (10): No Hesitation Where Risk to Human Life is High

The Defendant challenges the trial court's application of factor (10), that she had no hesitation about committing a crime when the risk to human life was high. She argues that the proof introduced at her sentencing hearing does not support the trial court's finding, necessary for factor (10)'s application, that the Defendant's criminal conduct created a risk to the lives of individuals other than the victim. The State concedes that the trial court improperly applied enhancement factor (10), but contends that the remaining applicable enhancement factors, under de novo review, justify the Defendant's sentences.

Enhancement factor (10) applies where the defendant “had no hesitation about committing a crime when the risk to human life was high.” T.C.A. § 40-35-114(10). In cases involving DUI convictions, which ordinarily involve an inherent risk to human life, enhancement factor (10) may be applied only where the proof establishes by a preponderance of the evidence “that other persons or motorists were either in the vicinity or placed at risk by the Defendant’s conduct.” *State v. Ronald Crook*, W2005-02476-CCA-R3-CD, 2006 WL 3516216, *5 (Tenn. Crim. App., at Jackson, Dec. 6, 2006) (quoting *State v. Philip R. Haven*, No. M2001-00332-CCA-R3-CD, 2002 WL 1585640, *11 (Tenn. Crim. App. at Nashville, Dec. 30, 2002), *perm. appeal denied* (Tenn. Dec. 30, 2002)), *perm. app. denied* (Tenn. May 21, 2007).

The trial court commented about the applicability of enhancement factor (10):

Well, we have a statement from the officer on both that make it look like there was more danger than ordinarily in one of these situations – or more danger than is necessarily present for a DUI.

....

I also find present the enhancing factor that there was created danger to the public. And I’ll refer everyone to the part of the very thorough Presentence Report that describes the circumstances under which – and this is – I’m referring to page 3 of the Presentence Report, the circumstances under which the two officers on these two occasions about two weeks apart found Ms. Baker in the vehicle that she was driving. It does appear that there certainly was a danger to the public created that would be one of our sentencing factors.

The trial court, therefore, based its application of factor (10) on the risk created to the drivers of and passengers in the vehicles affected by the Defendant’s operation of her vehicle, which the officers responding to reports of the Defendant’s erratic behavior reported in the presentence report.

Despite the State’s concession that enhancement factor (10) does not apply to the Defendant’s convictions, we agree with the trial court that enhancement factor (10) applies to the Defendant’s convictions. The risk created to the lives of the drivers and passengers of the vehicles surrounding the scene where the Defendant was apprehended on September 14, 2007, supports application of enhancement factor (10). The officer responding to the scene on September 14 reported that, by the time he arrived, the Defendant had stopped her car in a public road so that it “block[ed] both outbound lanes of traffic.” The officer instructed the Defendant to move her car from the roadway, but the Defendant backed her car onto a pedestrian sidewalk. After the officer informed her this was not what he intended, the Defendant then “attempted to pull out into the oncoming traffic.” The officer had to stop the Defendant from pulling into the oncoming vehicles. The record, therefore, shows that other motorists were “in the vicinity” of the Defendant’s conduct. *See Crook*, 2006 WL 3516216, at *5. We conclude that the officer’s report establishes by a

preponderance of the evidence that “other persons or motorists were either in the vicinity or placed at risk by the Defendant’s conduct.” *See id.* As such, the trial court properly applied enhancement factor (10) to enhance the Defendant’s DUI, seventh offense, conviction based on her September 14, 2007, conduct. She is not entitled to relief on this issue.

Similarly, the record supports the trial court’s application of enhancement factor (10) to the Defendant’s conduct on September 27, 2007. According to the presentence report, the officer responding to the scene on September 27 received a report that the Defendant’s vehicle had been involved in a wreck. When he arrived, he observed that the Defendant’s vehicle did, in fact, appear to have been involved in a wreck. Furthermore, the Defendant herself stated in the presentence report that on September 27 she “veered into the other lane and hit a truck.” The record, therefore, establishes not only that another person was “in the vicinity” of the Defendant’s conduct but also that the Defendant’s conduct tangibly affected another motorist. *See Crook*, 2006 WL 3516216, at *5. We again conclude that the officer’s report and the Defendant’s statement establish by a preponderance of the evidence that “other persons or motorists were either in the vicinity or placed at risk by the Defendant’s conduct.” *See id.* As such, the trial court properly applied enhancement factor (10) to enhance the Defendant’s DUI, seventh offense, conviction based on her September 27, 2007, conduct. She is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the law and applicable authorities, we conclude that the trial court did not err when it applied enhancement factors (1) and (10) to enhance the Defendant’s DUI, seventh offense, sentences. Accordingly, we affirm the Defendant’s four-year TDOC sentence.

ROBERT W. WEDEMEYER, JUDGE